

No. 88-193

88-193

Supreme Court, U.S.

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JOSEPH F. SPANIOL, JR.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH SCIAMBRA d/b/a
PERIODICAL MARKETING AND CONSULTING COMPANY
Petitioner

VERSUS

ARA SERVICES, INC.
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
PETITION FOR WRIT OF CERTIORARI

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Consulting Company



QUESTIONS PRESENTED

- I. Can an antitrust plaintiff's settlement with all but one defendant be considered in any way in determining the non-settling defendant's liability and plaintiff's damages, prior to trebling?
- II. Does an antitrust plaintiff forfeit his claim to damages already sustained by (1) obtaining a preliminary injunction, and (2) entering into a settlement agreement with other defendants, with the result that the non-settling defendant profits from the antitrust violation?

PARTIES TO THE PROCEEDINGS

The petitioner in this writ application was the only appellant in the Circuit Court and the only plaintiff in the District Court. There were no appellees below other than ARA Services, Inc. In addition to ARA Services, Inc., Graham News Company, Bayou News Agency, and Metro News Agency were defendants in the District Court. There were no other parties to the litigation.

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PERIODICAL MARKETING
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ARA SERVICES, INC.

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioner, Joseph Sciambra d/b/a Periodical Marketing and Consulting Company, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered on April 8, 1988. Rehearing was denied on May 17, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, *Joseph Sciambra d/b/a Periodical Marketing and Consulting Company v. Graham News Company, et al*, reported at 841 F.2d 651 (5th Cir. 1988), appears as Appendix A in the attached appendix. Copies of the district court's opinions on the issue of damages appear as Appendices B and C. The district court's rulings are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Joseph Sciambra d/b/a Periodical Marketing and Consulting Company ("Sciambra"), Graham News Company ("Graham") and respondent, ARA Services, Inc. ("ARA"), were engaged in the wholesale periodical distribution business, distributing books and magazines to retail establishments. From December 1977 until April 1984, these three were the only competitors in the relevant market (the greater New Orleans area).

ARA is the largest book and magazine distributor in the United States. Sciambra obtained his supply of periodicals from ARA. Sciambra, Graham and ARA distributed periodicals to their own respective retail accounts. The retailers in turn sold the periodicals at the retailers' places of business.

In late 1983 or early 1984, representatives of Graham and ARA discussed the possibility of Graham's purchasing ARA's business in New Orleans. As part of the sale of ARA's business to Graham, ARA agreed with Graham that ARA would terminate Sciambra's source of supply prior to the sale. Pursuant to this agreement, on March 19, 1984, ARA refused to provide Sciambra further with supplies.

ARA thereafter sold both its own periodical business and the business which had been Sciambra's, to Graham for approximately three million dollars. Of the three million dollars, ARA received approximately \$255,000 which was specifically allocated in the sale agreement for Sciambra's

business. Paragraph 2.1(c) of the ARA/Graham sale agreement provided:

The contract between Seller [ARA] and Joe Sciambra is not being assumed by Buyer [Graham], provided that both Buyer and Seller agree that sales by Seller to Joe Sciambra, Cash Route Operator, shall be included within the Aggregate Net Sales referred to in Section 2.1(a) to calculate the Purchase Price.

There are no questions whatsoever that ARA illegally terminated Sciambra, and sold his business to Graham, and that ARA received \$255,000 for Sciambra's business.

As a result of the termination of Sciambra and ARA's sale of Sciambra's business and its own business to Graham, Graham attained a monopoly as the only wholesaler of books and periodicals in the New Orleans area.

Sciambra filed this action against Graham, Bayou News Agency and Metro News Agency (collectively "the Graham interests") and ARA. The complaint alleged antitrust violations under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and §§ 4, 7 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 18 and 26. Basically the complaint alleged the acquisition of monopoly power, an attempt to monopolize, a conspiracy to monopolize, and a conspiracy in restraint of trade. The complaint sought both damages and injunctive relief.

A preliminary injunction was granted against the Graham interests, based on a finding of an attempt to monopolize in violation of the antitrust laws. The injunction required Graham to continue to provide periodicals to Sciambra.

Sciambra subsequently reached a settlement with the Graham interests, for \$165,000, pursuant to which Sciambra transferred his business to Graham as part of the settlement. The settlement agreement between Sciambra and Graham specifically recognized and reserved Sciambra's continued claim for damages against ARA. Exhibit A attached to the settlement noted that Sciambra claimed that his business was worth a minimum of \$245,000 and reserved his right to claim this amount against ARA.

After the settlement with Graham, the case proceeded against ARA as the only remaining defendant.

Shortly before trial, the district court determined that numerous discovery abuses by ARA made a fair trial impossible, and it imposed sanctions of a default judgment, attorney's fees and costs against ARA. After trial on the issue of damages, the court found that Sciambra was damaged in the amount of \$255,632, the amount which ARA had received from Graham for ARA's sale of Sciambra's business.

ARA and Sciambra both appealed on several issues, only one of which is before the Court on this Petition for Writ of Certiorari. Sciambra contended that he was entitled to the \$255,632, trebled under the antitrust laws, and ARA argued that Sciambra was only entitled to damages for the short period of time that he was out of business, the period between the time that ARA stopped selling to him and the time that the court ordered Graham to service Sciambra.

The Court of Appeals held that the district court erred in calculating damages according to the "going concern value" of Sciambra's business which was calculated by the district court based on the \$255,632 which Graham paid ARA for Sciambra's business. The Court of Appeals held

that Sciambra's damages are "limited to profits Sciambra lost during the days he could not operate because of ARA's and Graham's conduct." 841 F.2d at 657. The effect of the decision is to eliminate antitrust damages against ARA, as the \$165,000 settlement with Graham more than offsets lost profits for the days involved.

On May 17, 1988, the Circuit Court denied both Sciambra's application for rehearing en banc and ARA's application for rehearing.

REASONS FOR GRANTING THE WRIT

- I. Can an antitrust plaintiff's settlement with other defendants be considered in any way in determining the non-settling defendant's liability, prior to trebling?

In its opinion, the Court of Appeals erroneously reversed the district court and determined that Sciambra was not entitled to recover the amount which ARA had received for its sale of Sciambra's business. The Court of Appeals based its decision on the fact that, as part of the \$165,000 settlement with Graham, Sciambra sold what remained of his business for a recited consideration of \$40,000.

This decision sets an erroneous precedent. It allows evidence of settlement to be used for determining liability and damages, in violation of the Rules of Evidence, public policy, and basic principles applicable to the determination of antitrust injury and damages.

Federal Rule of Evidence 408 provides in part:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or

6.

offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

The district court correctly noted that the amount of the settlement is applied as an offset, after liability and total damages are calculated. In its Order and Reasons awarding damages, the district court stated (emphasis added):

Plaintiff's claim against non settling defendant ARA should be reduced by the settlement sum of \$165,000 paid by the Graham interests. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 55 (5th Cir. 1976). *Evidence of this settlement is considered only for this offset.* Rule 408, Rules of Evidence.

The Court of Appeals also correctly held that settlement is considered as an offset, after trebling. The Court of Appeals, however, also considered the settlement in assessing ARA's liability and the measure of Sciambra's damages, both of which determinations are in violation of Rule 408, public policy and antitrust principles.

Sciambra does not dispute that a settlement must be subtracted from treble damages in accordance with this Court's opinion in *Zenith*. However, there was no legitimate reason for the Court of Appeals also to consider the settlement with a co-defendant prior to determining damages.

"[A] principal purpose of Rule 408 is to encourage settlements by preventing evidence of a settlement (or its amount) from being used *against* a litigant who was involved in a settlement." *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1069 (5th Cir. 1986) (emphasis in original).

By holding in effect that an antitrust plaintiff may waive its antitrust claim by settling with a co-defendant and having the settlement used against him in determining liability and damages, the Court of Appeals has ignored this fundamental public policy. The result can only be to discourage the settlement of antitrust cases.

II. Does an antitrust plaintiff forfeit his claim to damages already sustained, by (1) obtaining a preliminary injunction, and (2) entering into a settlement agreement with other defendants, with the result that the non-settling defendant profits from the antitrust violation?

The decision of the Court of Appeals would establish an erroneous precedent which will allow an antitrust defendant to conspire to eliminate a competitor, receive payment for the elimination of the competitor, and retain the profit. The successful plaintiff, who prevails in obtaining an injunction against another defendant preventing plaintiff's elimination as a competitor, and who later prevails on the merits and who is entitled to receive damages, would be limited in damages to only the period the plaintiff is out of business. The plaintiff would have no right to the amount the antitrust conspirator received for plaintiff's business.

The obvious problem presented by the Court of Appeals' decision is that the injured plaintiff would have received the amount that the co-conspirator received for his business, if plaintiff had not sought an injunction, and if the plaintiff had refused to settle with defendant's co-conspirator.

The district court correctly found that \$255,632 represented Sciambra's damages. In its order of June 4, 1986, the district court noted that "[p]laintiff's damages are those proximately resulting from the termination of his business in April, 1984."

The district court's opinion is consistent with the maxim that an antitrust plaintiff's damages are determined at the time of injury which, in this case, was when Sciambra was terminated by ARA in April, 1984. As the Third Circuit noted in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776, 782 (3rd Cir. 1967), *aff'd in part, rev'd in part on other grounds*, 392 U.S. 481, *reh'g denied*, 393 U.S. 901 (1968), "the antitrust laws deal with a plaintiff at the moment of injury and do not look to subsequent events which may have reduced the impact of the wrongful conduct. The fact that [plaintiff] might have recouped some of the damage . . . is irrelevant to the question of damages." Sciambra's "moment of injury" was in April, 1984, when he was excluded from the market upon the agreement of the co-conspirators that ARA would be paid \$255,000 for Sciambra's business.

The Court of Appeals correctly noted that the general rule is that a plaintiff illegally excluded from a market may recover the going concern value of his business. However, the court then concluded, without any supporting authority, that Sciambra was not entitled to recover going concern value because he obtained a preliminary injunction returning him to the market, and because he then entered into a settlement agreement with Graham. 841 F.2d at 657.

The Court of Appeals next concluded that damages are "limited to profits Sciambra lost during the days he could not operate." The Court made no reference whatsoever to the overriding fact that ARA received the \$255,000 which

Sciambra should have received for his business, nor did the court cite any authority for its conclusion.

The Court of Appeals should have held that the general rule is applicable to Sciambra's damages, and that Sciambra is entitled to the going concern value which ARA received. The court should not have created a new rule for calculating antitrust damages, which is unsupported by any decision by any other court and is in fact contrary to both applicable law and public policy.

The Court of Appeals' decision ignores the fact that ARA eliminated Sciambra from the market by agreeing that ARA would sell Sciambra's business to Graham for \$255,000. Sciambra, not ARA, was entitled to be paid for his business. Instead, ARA received the \$255,000 and has been allowed by the Court of Appeals to retain these ill-gotten gains despite the fact that the remedies provided for by the antitrust laws are intended to deter antitrust violations and deprive violators of the fruits of their violations. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, *reh'g denied*, 434 U.S. 881 (1977).

The settlement with Graham was the only way that Sciambra, as an individual, could continue to prosecute his valid claim against ARA, the largest book distributor in the country, which engaged throughout these proceedings in such outrageous conduct as to warrant the imposition of the extreme sanction of default judgment.

This Court has long recognized that private actions are "a vital means for enforcing the antitrust policy of the United States" and a "bulwark of antitrust enforcement." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 136, 137 (1968). *See also Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S.Ct. 484, 499 (1986) and cases cited therein.

The Court of Appeals erred in holding that Sciambra was not entitled to receive as damages the value which ARA received for putting Sciambra out of business and then selling his business. This decision effectively allows ARA to flout the antitrust laws, commit egregious discovery conduct, and then retain the fruits of its illegal conduct. This decision contravenes the clear public policy of enforcing the antitrust laws through private actions, punishes a plaintiff who seeks injunctive relief, and discourages settlement.

CONCLUSION

The Court of Appeals erred in holding that an antitrust plaintiff's settlement with another defendant determines the non-settling defendant's liability and plaintiff's damages. The Court of Appeals also erred in improperly calculating damages in a manner which allows a person to violate the antitrust laws and flout the judicial system and then profit from its illegal conduct. Writ of Certiorari should issue to correct the decision of the Court of Appeals.

Respectfully submitted,

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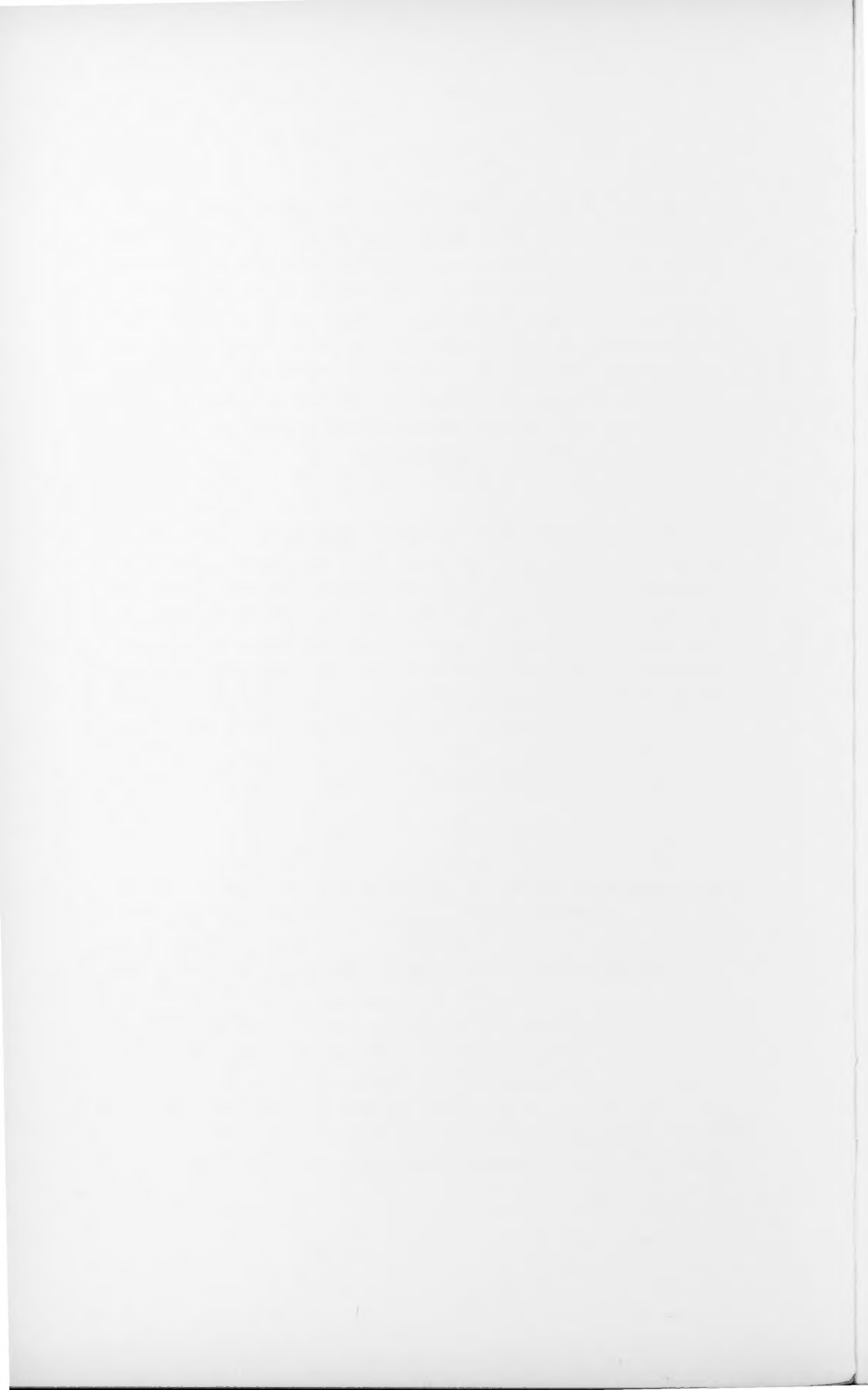
Attorneys for Petitioner,

Joseph Sciambra

d/b/a Periodical Marketing and

Consulting Company

APPENDIX



A-1

APPENDIX A

**Joseph SCIAMBRA d/b/a Periodical
Marketing and Consulting Company,
Plaintiff-Appellant Cross-Appellee,**

v.

**GRAHAM NEWS COMPANY, et al.,
Defendants,**

**ARA Services, Inc.,
Defendant-Appellee Cross-Appellant.**

No. 86-3501

**United States Court of Appeals,
Fifth Circuit.**

April 8, 1988.

**Appeals from the United States District Court for the
Eastern District of Louisiana.**

**Before TIMBERS,* KING, and HIGGINBOTHAM, Circuit
Judges.**

TIMBERS, Circuit Judge:

**Joseph Sciambra d/b/a Periodical Marketing and Consult-
ing Company ("Sciambra") appeals from a default judgment
entered February 20, 1987 in the Eastern District of Louisi-
ana, Marcel Livaudais, Jr., *District Judge*. The court imposed,**

***Circuit Judge of the Second Circuit, sitting by designation.**

pursuant to Fed.R.Civ.P. 37, a sanction in the form of a default judgment against ARA Services, Inc. ("ARA"), Sciambra's former supplier. The court awarded Sciambra damages based on his antitrust complaint. The court subtracted from its damage award the amount of a settlement between Sciambra and ARA's alleged coconspirator, the purchaser of ARA's business. The court then trebled that figure.

On appeal, Sciambra claims that the initial award should have been trebled *before* the amount of the settlement was deducted. ARA cross-appeals, claiming that the court (1) erred in imposing a default judgment under Rule 37; (2) lacked subject matter jurisdiction by virtue of the settlement; (3) erred in its assessment of damages; and (4) should not have trebled damages based on the default judgment.

We hold that the court had jurisdiction and we affirm the Rule 37 default judgment as a sanction. We reverse and remand, however, solely on the issue of damages, holding that the court erroneously based its calculations on the going concern value of Sciambra's business although he had sold it. On remand on the issue of damages, moreover, we instruct the district court to treble the award *before* deducting the amount paid in settlement by the alleged coconspirator.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

Sciambra distributed primarily magazines to retailers in the New Orleans area. He obtained his supply from ARA,

a wholesaler and competitor distributor of books and periodicals. ARA is the largest book and magazine distributor in the United States. Although ARA initially provided some retail accounts to Sciambra, he operated an independent business and had solicited and obtained the majority of his accounts. Metro News Agency ("Metro News") also was a wholesaler and competitive distributor in the New Orleans area. Graham News Company, Metro News and Bayou News Agency, Inc. (collectively "Graham") had substantially identical ownership and management.

In late 1983 or early 1984, representatives of Graham discussed with ARA the possibility of purchasing ARA's business in New Orleans. During several meetings between their representatives, Graham told ARA that it did not want to assume ARA's contract with Sciambra. ARA agreed to terminate Sciambra's source of supply prior to the sale of its business to Graham. It gave Sciambra 30 days notice of termination on March 19, 1984.¹

On March 16, ARA and Graham executed a sales agreement whereby ARA sold its business to Graham for \$2,799,065. The sales price was based on 65% of ARA's annual net sales. Apparently the value of a periodical business typically ranges from 10% to 100% of annual sales. Actual delivery of assets was to take place on April 2. ARA arranged for Graham to service Sciambra on the same terms as ARA had serviced him until April 18, pursuant to the notice of termination. After April 18, neither ARA nor Graham would supply Sciambra. Included in the total sales price paid by Graham for ARA's business was an amount expressly allocated for ARA's annual

1. Unless otherwise stated, all dates in this summary of the facts and prior proceedings are in the year 1984.

sales to Sciambra. The parties determined this amount to be \$255,632, based on 65% of ARA's annual net sales to Sciambra.

Paragraph 2.1(c) of the sales agreement provided:

"The contract between Seller [ARA] and Joe Sciambra is not being assumed by Buyer [Graham], provided that both Buyer and Seller agree that sales by Seller to Joe Sciambra, Cash Route Operator, shall be included within the Aggregate Net Sales referred to in Section 2.1(a) to calculate the Purchase Price."

Sciambra's business was the only account separately allocated in the agreement. During the course of negotiating the sale, both parties discussed potential antitrust concerns. Graham attempted to obtain from ARA an indemnity agreement covering any antitrust violations asserted by Sciambra. ARA would not agree to such a condition. After April 18 when Graham refused to supply products to Sciambra, Graham became the only wholesaler of books and periodicals in the New Orleans area.

On April 16, Sciambra commenced the instant action against Graham and ARA, alleging antitrust violations under §§ 1 and 2 of the Sherman Act, and §§ 4, 7, and 16 of the Clayton Act, as well as breach of contract claims under state law. The complaint alleged basically that ARA and Graham had conspired to restrain trade and to monopolize the wholesale distribution of periodicals in the Greater New Orleans market; and, for the purpose of eliminating him as a competitor, that they had refused to supply Sciambra with goods. Sciambra requested injunctive relief and \$255,632 in damages (the amount Graham and ARA allocated in their sales contract for his business), the damages to be trebled.

On June 29, Judge Feldman, to whom the case temporarily was assigned, granted Sciambra a mandatory preliminary injunction against Graham based on a showing of probable violation of § 2 of the Sherman Act. The injunction required Graham to supply periodicals to Sciambra. The injunction was not granted against ARA, who no longer was in the periodicals business in New Orleans. Graham began supplying Sciambra. Sciambra went back in business on about July 1. There were a total of approximately 70 days during which Sciambra lacked supplies before the injunction was entered.

Subsequently, on September 12, Sciambra and Graham entered into a sales contract. The contract provided that Graham would purchase Sciambra's business for the recited consideration of \$40,000. In connection with the sale, Sciambra and Graham entered into an undated non-competition agreement pursuant to which Sciambra agreed to refrain from commercial activity for seven years within one hundred miles of any retail account in South Louisiana serviced by him in 1983 or 1984.

On September 20, Sciambra and Graham entered into a settlement agreement, releasing Graham from any alleged antitrust violations asserted by Sciambra, for the sum of \$125,000. Apparently, the sale and settlement (collectively the "Graham sales settlement") were agreed upon at the same time. Pursuant to the agreement, Sciambra ceased operations in October. ARA was not a party to that agreement.

The instant action continued against ARA. A total of ten court orders were entered by Magistrate Fonseca and Judge Livaudais to enforce discovery against ARA. Shortly before trial, the court determined that numerous discovery abuses by ARA made a fair trial impossible. On March 7, 1986, the court, pursuant to Fed.R.Civ.P. 37(b)(2)(C) and (E),

imposed sanctions against ARA consisting of a default judgment, costs and attorney's fees for repeated failures to comply with court-ordered discovery.

After trial on the issue of damages, the court, in its June 4, 1986 order, awarded \$255,632 in damages against ARA, based on what the court perceived as the market value of the business—that which a willing seller and a willing buyer would pay—as evidenced by the ARA/Graham sale allotting \$255,632 for Sciambra's business. Although Sciambra offered his business to both ARA and Metro News for \$100,000 when his supply was being terminated and he could not find an alternative source, the court held that it was hardly an "arms length" negotiation. The court subtracted the \$165,000 Graham sales settlement from the \$255,632 damages. Although the court initially did not permit trebling, it subsequently entered an amended order on February 20, 1987 and trebled the \$90,632 damage award. The result was an award of \$271,896 in damages, plus attorney's fees of \$69,414.72 and costs of \$8,085.95.

From the judgment entered on that order the instant appeal has been taken.

II.

We turn first to ARA's claim that the court abused its discretion in imposing a sanction in the form of a default judgment. ARA asserts that the court's findings of fact on which it based its sanction are unsupported by the record. We disagree.

A district court has discretion to impose sanctions under Rule 37. Judgment by default, although a harsh sanction, is one contemplated by the Rule. We will reverse a determination that sanctions are warranted only if the district court

has abused its discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976) (per curiam), *Batson v. Neal Spelce Ass'n, Inc.*, 765 F.2d 511, 514 (5th Cir.1985).

Upon our review of the record, we affirm the entry of the judgment by default. The court explained in detail the factors leading to its decision to impose a default judgment. True, the court's findings were drafted by Sciambra and signed by the judge, a practice we disfavor. *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir.1980). But viewing these findings with a more critical eye, we hold that they do not amount to an abuse of discretion.

The magistrate had ordered production, among other documents, of all notes from the negotiations leading to the ARA/Graham sale kept by certain ARA officials; certain documents pertaining to ARA's relationship with Sciambra; and documents regarding Sciambra's termination by ARA. ARA complied only partially. It refused to provide most of the documents or claimed that they did not exist—a claim not credited by the court. The court found significant that, although Sciambra and ARA had had a seven year relationship, ARA failed to produce any meaningful documents concerning this relationship or Sciambra's termination. ARA refused to produce documents it claimed were privileged even after the court offered to provide for in camera inspection. ARA did not comply with a number of discovery orders. Moreover, lesser sanctions were tried by the magistrate, but to no avail. The magistrate, in an order entered July 31, 1985, imposed attorney's fees as a sanction for ARA's conduct. In subsequent orders, ARA was warned that further sanctions would follow if noncompliance continued. Finally, the court specifically found a default judgment was warranted because of the prejudice to Sciambra due to the extent and nature of the documents not produced and the

“extreme and unwarranted and deliberate delay” in complying with court-ordered production.

Based on the record, we hold that the court clearly was within the scope of its authority in imposing a default judgment as a sanction against ARA. The court carefully considered the appropriate alternatives. There was no abuse of discretion whatsoever.

We affirm the entry of the default judgment awarding damages in favor of Sciambra, as well as the award of attorney’s fees and costs in his favor—all against ARA.²

III.

We turn next to ARA’s claim that the settlement between Sciambra and Graham divested the court of subject matter jurisdiction.

The premise of this argument is that Sciambra’s lost profit was negligible and was exceeded by the amount paid by Graham in settlement. ARA asserts, therefore, that there was no justiciable case or controversy. We disagree.

ARA relies primarily on the decision of the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 341 (1971), in which the Court reaffirmed well-settled law that an antitrust plaintiff “who has recovered any item of damage from one conspirator may not again

2. See a recent Second Circuit opinion, *Update Art, Inc. v. Modin Publishing Ltd.*, Docket No. 87-7868, slip op., _____, _____ F.2d _____ (March _____, 1988), affirming summary judgment awarding \$475,406 damages as a Rule 37 sanction against defendants for repeated bad faith noncompliance with discovery orders in a copyright infringement action.

recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double payment." ARA also cites the Second Circuit decision in *Abrams v. Interco, Inc.*, 719 F.2d 23, 31-34 (2d Cir.1983). In *Abrams* an antitrust action was dismissed after the defendant offered to settle with the plaintiff class.

We hold that the settlement in the instant case did not result in the court's losing subject matter jurisdiction. At the outset, we find instructive our prior decisions in *Green v. Ferrell*, 664 F.2d 1292 (5th Cir.1982), and *Chatham Condominium Ass'ns v. Century Village, Inc.*, 597 F.2d 1002, 1011 (5th Cir.1979), although neither decision involved the effect of a settlement. In *Green*, we held that "[a] plaintiff's failure to state a meritorious cause of action does not defeat subject matter jurisdiction." *Green, supra*, 664 F.2d at 1294. Particularly when antitrust claims are involved, it is a "well-established principle in this Circuit that premature dismissals . . . for lack of subject matter jurisdiction are not favored 'where the factual and jurisdictional issues are completely intermeshed. . . .'" *Chatham Condominium Ass'ns, supra*, 597 F.2d at 1011 (quoting *McBeath v. Inter-American Citizens for Decency Committee*, 374 F.2d 359, 363 (5th Cir.), *cert. denied*, 389 U.S. 896 (1967)).

Our holding that the court here had jurisdiction is not contrary to either Supreme Court or Second Circuit precedent. Rather, we believe that ARA ignored both the thrust of the Supreme Court's reasoning in *Zenith* and the distinguishing facts involved in *Abrams*.

Of primary importance in *Zenith* was the Supreme Court's directive that the effect of a settlement releasing coconspirators in an antitrust case rests on the intent of the parties. *Zenith, supra*, 401 U.S. at 345-56. The Court held, applying

the intent test, that the plaintiff was entitled to future damages from the defendant, a coconspirator who was not a party to the settlement, despite the settlement. The Court based its holding on a finding that the settlement agreement was *understood by the parties* to the agreement as compensation *only* for damages up to the date of the agreement. *Id.* at 348. In discussing the effect of the settlement, moreover, the Court did not speak in terms of "jurisdiction"; rather, it discussed whether the coconspirator who was not a party to the agreement would be "released" or was entitled to a defense of payment. *Id.* at 343-48.

The *Abrams* decision, which does discuss the effect of settlement in jurisdictional terms, is readily distinguishable. There, the Second Circuit held that there no longer was a "justiciable controversy" after a *sole* defendant in an anti-trust action offered a plaintiff class comprised of persons who had bought any of defendant's products three times the total amount of their purchases plus reasonable attorney's fees and costs. The effect on a coconspirator was not even at issue. Moreover, unlike the instant case, the amount of potential damages involved in *Abrams* was quite clear. Finally, there is no doubt that even under *Abrams* a court must have subject matter jurisdiction in order to make an initial determination of whether the settlement satisfied the relief to which the plaintiff was entitled.

In short, we hold that the court in the instant case had subject matter jurisdiction. Accordingly, the court had the authority to impose a default sanction and to assess damages, costs, and attorney's fees. Although the court had jurisdiction, however, under *Zenith* we still must determine whether ARA had a valid defense of payment for any portion of the damages based on the Graham settlement. Accordingly, we turn now to the issue of damages.

IV.

The court calculated the damages sustained by Sciambra by determining the loss of good will and the loss of the ongoing business. The best evidence of this resale value, the court found, was the price Graham was willing to pay for Sciambra's accounts. ARA disputes both the application of going concern value and the use of the amount allotted in the ARA/Graham contract as a measure of going concern value.

As a general rule, going concern value is a permissible alternative to lost profits as a measure of damages for a claim of illegal exclusion from a market. *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 429 n. 15 (5th Cir.1985); *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 663-64 (5th Cir.1974). On the facts of the instant case, however, we hold that the court erred in applying going concern value. Sciambra was not forced out of business by ARA and Graham. The court had granted Sciambra a preliminary injunction which enabled him to continue receiving supplies; prevailing on the merits would have assured his future supplies as well. Rather, Sciambra agreed to settle with Graham and, as part of the settlement he agreed to sell his business and covenanted not to compete with Graham. It appears, therefore, that Sciambra's voluntary sale caused the loss of his ongoing business, not the antitrust violations. Going concern value is an alternative to lost profits as a measure of antitrust damages *only* in cases where the antitrust victim was actually forced out of business. See *Pierce, supra*, 753 F.2d at 429; *Lehrman, supra*, 500 F.2d at 663-64.

Accordingly, we reverse the court's determination of damages. We remand with instructions to the district court to proceed in accordance with this opinion, including an

examination of the Graham settlement in light of the *Zenith* intent test and an award of damages limited to profits Sciambra lost during the days he could not operate because of ARA's and Graham's conduct. Since we hold that the court erroneously applied going concern value as the measure of damages, we find it neither necessary nor appropriate to determine whether the court erred in calculating the value of the going concern of Sciambra's business.

V.

We next turn to whether the court erred in deducting the amount of the Graham settlement from the damage award, and then trebling that amount to determine the final judgment against ARA. Once the court on remand determines the proper amount of damages, we agree with Sciambra's claim that the court should treble the amount of the damage award against ARA *before* deducting the amount of the Graham settlement. In the seminal case of *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957), the Ninth Circuit held that there should be no deduction for settlement until after trebling. "Any other method would have resulted in plaintiffs receiving less than the whole to which they were entitled." *Id.* at 398. We find no contrary court of appeal authority. *E.g.*, *Hydrolevel Corp. v. American Society of Mechanical Engineers, Inc.*, 635 F.2d 118, 130 (2nd Cir.1980), *aff'd on other grounds*, 456 U.S. 556 (1982); *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 534 (3rd Cir.), *cert. denied sub nom. Wilson Freight Forwarding Co. v. Baughman*, 429 U.S. 825 (1976); *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 390 (4th Cir.), *cert. denied*, 461 U.S. 914 (1983); *Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361, 1371 (10th Cir. 1972). Logically, also, a settlement between a plaintiff and an alleged antitrust coconspirator would take into account that judgment for the plaintiff would result in treble damages.

ARA does not dispute the overwhelming authority which supports Sciambra's position. Rather, ARA asserts that trebling a damage award premised on a default judgment imposes an unjustified sanction. We disagree.

ARA assumed the risk in disobeying discovery orders that the court would direct a default judgment in this anti-trust action where damages are trebled by law. *See Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915 (9th Cir.1987). Moreover, we will not permit ARA to profit from its contumacious behavior. Had the court not felt compelled to impose sanctions and had the trial culminated in a judgment for Sciambra, damages would have been trebled. We will not deny an antitrust plaintiff treble damages when a defendant's dilatory behavior leads the court to impose judgment by default.

VI.

To summarize:

We affirm the district court's default judgment in imposing as a Rule 37 sanction an award to Sciambra of damages, attorney's fees, and costs.

We reverse and remand on the issue of damages. When Sciambra sold his business to Graham, he no longer could recover going concern value from ARA. We instruct the district court on remand to limit damages to the profits Sciambra lost and to treble damages *before* deducting any amount paid by Graham in settlement.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

WEST KEY NUMBER SYSTEM

A-14

APPENDIX B

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

**CIVIL ACTION
NO. 84-1859
Section: E/4**

**JOSEPH SCIAMBRA, d/b/a
PERIODICAL MARKETING and
CONSULTING COMPANY**

versus

GRAHAM NEWS COMPANY, ET AL

**FILED
U.S. DISTRICT COURT
EASTERN DISTRICT, LA
JUN 4 3:23 PM '86
LORETTA G. WHYTE
CLERK
(stamp)**

ORDER AND REASONS

This is an antitrust case in which plaintiff claims that he was eliminated as a competitor, was the victim of a joint refusal to deal, and that a monopoly was created, in violation of Sections One and Two of the Sherman Act, 15 U.S.C. §§ 1, 2. Plaintiff also sues for breach of contract.

**DATE OF ENTRY JUN 5 1986
(stamp)**

Both plaintiff and defendants were engaged in the wholesale periodical distribution business, distributing books and magazines to retail establishments in the greater New Orleans area. From December 1977 to April 1984, there were three companies in the relevant market, Graham News Company (or its predecessor, Metro News Agency), ARA Services, Inc. and plaintiff. After ARA sold its business to Graham on April 19, 1984, only Graham remained in the market.

During the relevant times, plaintiff obtained his supply of periodicals from defendant ARA pursuant to a contractual supply arrangement. ARA and Metro News Agency (a predecessor corporation to Graham, with substantially identical ownership and management) obtained their supplies of periodicals in bulk from so-called "national distributors." Plaintiff, Metro and ARA all supplied periodicals to their respective retail accounts. The retailers in turn sold the periodicals at the retailers' places of business.

Plaintiff alleges that, although initially, in 1977, ARA provided some retail accounts to plaintiff, and it supplied periodicals to him, plaintiff operated his own, independent, business. He had his own offices and warehouse, his own delivery vehicles, his own fixtures, his own equipment, his own supplies, and his own employees. Plaintiff had solicited and obtained the majority of the retail accounts which he was servicing when his business was terminated.

In late 1983 or early 1984, representatives of Metro and ARA discussed the possibility of Metro purchasing ARA's business in New Orleans. During meetings between representatives of ARA and Metro, plaintiff was discussed. Metro representatives told ARA that they did not want to assume ARA's contract with plaintiff, if the sale was accomplished, and ARA in turn indicated to Metro that it had the ability to terminate plaintiff's source of supply. Metro requested

that ARA terminate plaintiff's supply, which ARA did by telegram dated March 19, 1984.

A purchase agreement was completed, and ARA sold its periodical business to Graham for \$2,799,065; ARA was allocated \$255,632 for plaintiff's business. In this suit, plaintiff seeks this sum.

Paragraph 2.1(c) of the ARA/Graham sale agreement provides explicitly that even though Graham was not going to supply products to plaintiff, the value of ARA's sales to plaintiff would be included in the calculation of the purchase price. The precise language of Paragraph 2.1(c) states:

"The contract between Seller [ARA] and Joe Sciambra is not being assumed by Buyer [Graham], provided that both Buyer and Seller agree that sales by Seller to Joe Sciambra, Cash Route Operator, shall be included within the Aggregate Net Sales referred to in Section 2.1(a) to calculate the Purchase Price."

Evidence revealed that the value of periodical business ranges from 10% to 100% of annual sales. In this instance Graham paid ARA 65% of annual sales for ARA's business and 65% of annual sales for plaintiff's business.

In the complaint, plaintiff claims that defendants engaged in an unlawful "conspiracy in restraint of trade" (in violation of Section 1 of the Sherman Act) and an unlawful "conspiracy to monopolize" (in violation of Section 2 of the Sherman Act). Plaintiff contends that as a result of the agreement Graham became the only wholesaler of books and periodicals in the New Orleans area, thereby allegedly having a monopoly of the relevant market.

On June 13 and 14, 1984, plaintiff's application for a preliminary injunction was tried before Judge Martin L.C. Feldman, to whom the case was temporarily allotted. Judge Feldman issued a preliminary injunction, based on a probable violation of Section Two of the Sherman Act. The injunction required Graham News Company to supply periodicals to plaintiff.

Judge Feldman issued Findings of Fact and Conclusions of Law in connection with the issuance of the preliminary injunction. The Court noted the Sixth Circuit's opinion in *Byars v. Bluff City News Company*, 609 F.2d 843 (6th Cir. 1979) as very instructive with respect to the application of antitrust principles to the periodical distribution business.

Plaintiff subsequently entered into a settlement agreement with Graham News Company, Metro News Agency and Bayou News Agency for \$165,000 and ceased his distribution business. This case then proceeded against ARA as the only remaining defendant. On March 7, 1986 the Court, pursuant to Rule 37(b)(2)(C) and (E), Federal Rules of Civil Procedure, imposed, for reasons stated, sanctions of default judgment against ARA and an award of plaintiff's costs and attorney's fees. (Record Document 149). An evidentiary hearing was conducted to determine the amount of damages to be awarded.

Plaintiff has established injury consequential of antitrust violations and entitlement to just and reasonable damages based on relevant data. *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 46 (5th Cir.) *cert. denied*, 409 U.S. 1077 (1972). Some cases speak of recovery of losses of going concern value, capital value, or good will as a separate item of recovery. It is quite clear, however, that lost future profits and going concern value may not be recovered in the same case because they are equivalent and because double recovery is

not allowed. *Green v. General Foods Corp.*, 517 F.2d 635, 663 (5th Cir. 1975).

Plaintiff's damages are those proximately resulting from the termination of his business in April, 1984. The market value of this business, evidenced by the March, 1984 ARA - Graham sale, was \$255,632, that which a willing seller and a willing buyer agreed upon. Plaintiff's claim against non settling defendant ARA should be reduced by the settlement sum of \$165,000 paid by the Graham interests. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *Capra, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 55 (5th Cir. 1976). Evidence of this settlement is considered only for this offset. Rule 408, Rules of Evidence. Applying the offset plaintiff should have judgment against ARA in the sum of \$90,632.00. Trebling of this sum is inappropriate in view of the imposition of liability by sanction. *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 303 (5th Cir. 1984). A hearing to determine attorney's fees will be scheduled in the event the parties are unable to stipulate same within 15 days.

New Orleans, Louisiana, June 4, 1986.

s/s Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States District Judge

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 84-1859
SECTION: E/4

JOSEPH SCIAMBRA, d/b/a PERIODICAL
MARKETING and CONSULTING CO.

VERSUS

GRAHAM NEWS COMPANY, ET AL

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
FEB 20 4:18 PM '87
LORETTA G. WHYTE
CLERK
(stamp)

AMENDED ORDER AND REASONS

The June 4, 1986 Order and Reasons entered by the court (Record Document 154) are thus amended only insofar as the amount of damages are concerned. The Court is of the opinion that it has misapplied the law in considering *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 303

DATE OF ENTRY FEB 23 1987
(stamp)

(5th Cir. 1984). Accordingly, page 5 of the aforesaid Order and Reasons is amended so as to now read as follows:

"Plaintiff's damages are those proximately resulting from the termination of his business in April, 1984. The market value of this business, evidenced by the March, 1984 ARA-Graham sale, was \$255,632, that which a willing seller and a willing buyer agreed upon. Plaintiff's claim against non settling defendant ARA should be reduced by the settlement sum of \$165,000 paid by the Graham interests. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *Capra, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 55 (5th Cir. 1976). Evidence of this settlement is considered only for this offset. Rule 408, Rules of Evidence. Applying this offset plaintiff should have judgment against ARA, as follows:

\$255,632.00	Value
-165,000.00	Offset
<hr/>	
90,632.00	Damages
x 3	Trebled
<hr/>	
\$271,896.00	Total Damages

Damages are trebled pursuant to applicable antitrust principles. 15 U.S.C. §15 provides that the successful plaintiff *shall recover threefold* the damages sustained, costs of the suit and a reasonable attorney's fee."

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A hearing has been conducted by the Magistrate with respect to costs and attorney's fees.

New Orleans, Louisiana, this 20th day of February, 1987.

s/s Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States District Judge

(2)
NO. 88-193

Supreme Court, U.S.

FILED

AUG 27 1988

JOSEPH F. SPANIOL, JR.
CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1988

**JOSEPH SCIABMRA d/b/a
PERIODICAL MARKETING
AND CONSULTING COMPANY**
Petitioner

VERSUS

ARA SERVICES, INC.
Respondent

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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**LIST OF PARTIES,
INCLUDING AFFILIATED CORPORATIONS**

The parties to these proceedings are correctly listed by petitioner. ARA Services, Inc., respondent, pursuant to Rule 28.1, notes that its parent company is The ARA Group, Inc. The ARA Group, Inc. has no subsidiaries or affiliates that are not wholly owned except ARA/AS (a Norwegian corporation), Major Foods Limited (a Canadian corporation), and VS Services, Ltd. (a Canadian corporation).

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**In The
Supreme Court of the United States
OCTOBER TERM, 1988**

88-193

**JOSEPH SCIABMRA d/b/a
PERIODICAL MARKETING
AND CONSULTING COMPANY**
Petitioner

VERSUS

ARA SERVICES, INC.
Respondent

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

STATEMENT OF THE CASE

Respondent, ARA Services, Inc. ("ARA"), recommends to the Court the Fifth Circuit's summary of the pertinent facts and prior proceedings, reprinted at page A-2 through A-6 of the appendix to Sciambra's Petition, as far more faithful to the actual facts of this case and the course of the proceedings below than Sciambra's statement of the case. Except to note that the only court that has ever considered the factual merits of this case found that ARA did not violate the antitrust laws, ARA will limit its comments here to those aspects of Sciambra's statement that deserve it.

Sciambra's characterization of himself as a book and magazine wholesaler and a competitor of ARA's in the Greater New Orleans geographical market is certainly misleading. Sciambra was in fact a sub-distributor, or cash route operator, and obtained all of his relevant supply from ARA. His initial accounts came from ARA — those that ARA deemed uneconomical or inconvenient to serve with its own employees. The cash route agreement between them called upon Sciambra to disclose his customer list to ARA and to update the list from time to time. ARA local management on several occasions attempted to smooth over trouble that had arisen between Sciambra and certain of his accounts. Those are not the arrangements or actions of competitors in any sensible use of the term.

The pre-termination relationship between Sciambra and ARA must be understood, if it is to be understood properly, in light of the fact that it was ARA, not Sciambra, that had the continuing and valuable relationships with national distributors and publishers, the ultimate source of the books and magazines that they both sold. And since it was ARA that was responsible to the national distributors and publishers for satisfactory service to New Orleans retailers, ARA had an interest in knowing who Sciambra's customers were and in assisting him in providing service to them, wherever such assistance became necessary. If Sciambra competed with anybody, it was with Metro News.

It is also misleading for Sciambra to state that ARA "agreed" with Graham, as part of the sale of its New Orleans magazine and book distribution assets to Graham, "that ARA would terminate Sciambra's source of supply prior to the sale." The simple economic facts were that ARA had lost several major accounts to Metro News in the months before the sale negotiations took place and that its

prospects were sufficiently dim that management had decided to close the facilities from which it might have continued to supply Sciambra with merchandise. It inquired of Graham, in light of those simple facts, whether Graham would be interested in taking on Sciambra as a cash route operator and had as a response that Graham had no corporate experience or history with cash route operators and preferred, for security reasons, to continue operating exclusively through its own employees. Since the cash route agreement between ARA and Sciambra provided on its face for termination without cause on thirty days' notice, it remained only for ARA to send the notice. Given that the anticipated closing on the assets sale was less than thirty days away, however, ARA took it upon itself to arrange to have Graham supply Sciambra with merchandise for that portion of the termination-notice period that remained unexpired after the physical closing. As it turned out, Graham News serviced Sciambra, on terms completely satisfactory to him, for approximately two weeks.

It is, therefore, not a fair comment that ARA terminated Sciambra as an accommodation to Graham or otherwise, or that it was paid for doing so. The choice was solely Graham's, given that it was unavoidable, after ARA's determination to cease operating in New Orleans, that ARA would stop dealing with Sciambra. Graham hardly needed ARA's concurrence to chose to supply or not supply Sciambra. ARA merely sent Sciambra a termination notice in keeping with the cash route agreement between them and did so as soon as possible after its commitment to sell its assets to Graham became firm. There is absolutely nothing sinister or illegal in that.

Paragraph 2.1(c) of the ARA/Graham sales agreement, specifically noting the inclusion of ARA's sales to Sciambra in the aggregate net sales figure that was to provide the basis on which the dollar sales price was to be

determined, at 65%, does *not* establish "that ARA received \$255,000 for Sciambra's business." Other provisions were to the effect that net sales by ARA to those of its former customers that had been won over to Metro/Graham during the prior year were *not* to be included in the aggregate net sales base and so not to be reflected in the sale price. Although there was probably little room for disagreement on the point anyway, the parties decided to play it safe and specify clearly that ARA's sales to Sciambra were not in that category and, therefore, not to be deleted, despite Graham's announcement of its intention not to continue to supply him.

And it is emphatically not the case that an arm's-length valuation of ARA's assets at 65% of ARA's net annual sales to its customers, given its capital and expense structure and its way of doing business, fixes or even tends to fix the value of Sciambra's or any customer's business in reselling the merchandise. ARA sold its operating assets to Graham, and the parties to the sales agreement valued those assets in accordance with a formula that depended on net annual sales. It did not sell Sciambra's business. And neither the dollar amount it received from Graham for its assets nor the formula employed in arriving at that dollar amount would tend to show what Sciambra's own business, his own capacity to derive net profits from his operations, was worth.

All discussion of the going concern value or good will that may have inhered in Sciambra's business is beside the point, however, given that loss of going concern value or good will is precisely what the preliminary injunction entered against Graham prevented. Sciambra's own testimony, corroborated fully by that of a Graham principal, was to the clear effect that his customers, merchandise, terms of sale, expense structure, prices, and opportunity to make profits under the injunction were identical

to those that he had before ARA closed its doors. The only thing that did change was his sales volume, and that went up.

Plaintiff himself has never estimated his loss of net profits during the 70-day hiatus in his operations at more than \$14,000 — and that estimate is far too high. His settlement with Graham, as Sciambra has admitted at page 5 of his Petition to the Court, “more than offsets lost profits for the days involved.”

ARA was not a party to the settlement between Graham and Sciambra. It was neither consulted during the course of the negotiations nor notified that they were going on. One may reasonably infer that the settling parties ignored ARA because ARA had won on the preliminary injunction and because it was wholly implausible that it might be found later to have monopolized or conspired to monopolize a market that it had abandoned. Despite all that, the settlement has natural and legal consequences for ARA. The principal one flows from the simple fact that Graham paid Sciambra more than three times his maximum injury. It is only on account of Sciambra's stubborn refusal to acknowledge that fact, and its necessary implication, that this Petition is before the Court. The necessary implication is, of course, that the settlement pays the claim in full and ends the case.

REASONS FOR DENYING THE WRIT

- I. Can an antitrust plaintiff's settlement with other defendants be considered in any way in determining the non-settling defendant's liability, prior to trebling?

What Sciambra appears to be driving at in his discussion of this first question is that the Fifth Circuit

erred in looking to the sale of his business to Graham, part and parcel of a settlement, before determining the extent of ARA's liability or Sciambra's damages, in violation of the strictures of Rule 408 of the Federal Rules of Evidence. The suppressed premise of the argument is that plaintiff became entitled to recover treble the value of his business when it was, as he alleges, sold or destroyed by the defendants in April 1984. Sciambra's conclusion is that it violates the rule against using settlements to determine liability or quantum for the court to have relied on evidence that plaintiff settled his case and sold his business in September 1984 in determining the amount of his continuing injury.

The basic flaw in the argument is that it misapprehends the Fifth Circuit's reasoning. The court wrote:

Sciambra was not forced out of business by ARA and Graham. *The court had granted Sciambra a preliminary injunction which enabled him to continue receiving supplies; prevailing on the merits would have assured his future supplies as well.* Rather, Sciambra agreed to settle with Graham and, as part of the settlement, he agreed to sell his business and covenanted not to compete with Graham. It appears, therefore, that Sciambra's voluntary sale caused the loss of his ongoing business, not the antitrust violations.

Quoted in the appendix to Sciambra's Petition at page A-11 (emphasis added). The point is that the preliminary injunction, not the settlement, stopped Sciambra's accumulating injury after 70 days. Sciambra's cessation of operations after that, pursuant to the Graham settlement and the covenant not to compete with Graham, was voluntary, not traceable to ARA or anything that it did or didn't do. Having had his going concern value and good will

restored to him by the preliminary injunction, Sciambra cannot complain that it was lost a second time through voluntary action on his part. Evidence of the settlement and the covenant not to compete were offered not to show that they ended Sciambra's continuing injury but rather only to demonstrate that the injury—ending effects of Judge Feldman's preliminary injunction had, by agreement of the parties to the settlement, become permanent. Rule 408 doesn't come into question.

It was not, moreover, the quality of the Graham/Sciambra settlement agreement *qua* settlement that led the Fifth Circuit to use evidence of it the way it did. Plaintiff must prove his own damages, even where the court has entered a default.¹ *U.S. ex rel M-CO Construction, Inc. v. Shipco General, Inc.*, 814 F.2d 1011, 1014 (5th Cir. 1987). Sciambra's proof in the trial court was not that his business had been destroyed but rather that he had experienced an involuntary operational hiatus of 70 days between April and July of 1984 and a voluntary cessation of operations after September. That proof alone is sufficient to dictate the result ARA sought and obtained in the Fifth

¹ ARA decided not to cross-petition the Court on the appropriateness of entry of a discovery default in this case, not because it concedes the point, but rather because it is convinced that the Fifth Circuit's handling of the damages issue is correct and that the practical result on remand, as Sciambra has already predicted, will be that he will recover nothing. Even so, it cannot let pass without comment Sciambra's castigation of ARA as having "engaged throughout these proceedings in such outrageous conduct as to warrant imposition of the extreme sanction of default judgment." Petition at 9. The cold record reflects nothing of the sort, but rather only an insistence on ARA's part that the injunction and settlement, taken together, undercut Sciambra's continued prosecution of its groundless claim against ARA in precisely the manner that a unanimous panel of the Fifth Circuit has now declared it undercut. There were *no* discovery battles in the case until *after* ARA filed its motion suggesting that the injunction and settlement, taken together, mooted the claim. The outrageous conduct was by the plaintiff, in continuing to prosecute it.

Circuit, and it matters not that Sciambra's voluntary cessation of operations in September 1984 was pursuant to a settlement agreement.

ARA does not understand Sciambra to complain that Rule 408 prohibited consideration by the courts below of the amount of the settlement in applying this Court's offset rule for antitrust cases, as explained in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). ARA doesn't either.

II. Does an antitrust plaintiff forfeit his claim to damages already sustained, by (1) obtaining a preliminary injunction, and (2) entering into a settlement agreement with other defendants, with the result that the non-settling defendant profits from the antitrust violation?

Where the preliminary injunction works, in that it puts a stop to the plaintiff's accumulating injury, and plaintiff's settlement receipts are greater than three times his past injury, the answer to the question Sciambra poses is unequivocally and bluntly yes. Preliminary injunctions are granted precisely to put a stop to ongoing injury. See *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974). And where one does the job it was intended to do, as the one entered in this case did, it is nonsensical for a party to suggest that the court should ignore the fact and award damages as if the injunction had neither been asked for nor granted.

The Third Circuit's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776, 782 (3d Cir. 1967), *aff'd in part, rev'd in part on other grounds*, 392 U.S. 481, *reh'g denied*, 393 U.S. 901 (1968), is not to the contrary, as ARA has explained in detail in the prior proceedings in this case. At issue in *Hanover Shoe* was the validity of defendant's assertion of a passing-on defense,

that is, a defense that plaintiff lessee of defendant's shoe machinery could not recover monopolistic overcharges in machinery rent because plaintiff had recovered those overcharges in the higher prices it charged its customers for shoes it made with the machines. This Court rejected the passing-on defense, but without reliance on the proposition for which Sciambra cites the Third Circuit opinion. See 392 U.S. at 487-94. There is nothing in any of the *Hanover Shoe* decisions, moreover, including the lengthy finding on damages reported in 245 F. Supp. 258 (M.D. Pa. 1965), to indicate that the courts viewed plaintiff's injury as accruing in perpetuity, beyond the time that defendant undertook compliance with an antitrust injunction that prohibited maintenance of the lease-only policy for its shoe machinery that facilitated its extraction of monopolistic overcharges. See *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). Read properly, the Third Circuit's comment in *Hanover Shoe* was only to the effect that *injury, once incurred*, is antitrust compensable without regard to the victim's success or failure in attempting to cover. It is not to the effect that post-violation developments are immaterial to the accrual and assessment of injury, or that violations or their effects are eternal. Appropriate and effective injunctions, such as that entered in *Hanover Shoe* itself, are obviously of utility in ending violations and injury. That they do so is clear from even a cursory reading of the decisions in *Los Angeles Memorial Coliseum Commission v. National Football League*, 791 F.2d 1356 (9th Cir. 1986), *cert. denied sub nom Los Angeles Raiders v. National Football League*, ____ U.S. ____, 108 S. Ct. 92, 98 L.Ed. 2d 53, 56 U.S.L.W. 3243 (1987); *Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981); *City of Mishawaka, Ind. v. American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980); and *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

The *Zenith* offset rule is unchallenged, even by Sciambra, and clearly to the effect that "a plaintiff who has recovered any item of damage from one co-conspirator may not again recover the same item from another co-conspirator; the law, that is, does not permit a plaintiff to recover double payment." 401 U.S. at 348. This Court made no allowance in *Zenith* for an exception to that rule where application of it would allow a non-settling defendant to keep all or part of his ill-gotten profit. Quite the contrary. The Court extended the rule in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 636 (1981), wherein it held that antitrust defendants had no right of contribution among themselves, rejecting the argument that a rule permitting contribution would promote "a greater likelihood that most or all wrongdoers will be held liable and thus share the consequences of the wrongdoing." If, as *Texas Industries* teaches, antitrust defendants are to be left where they are found, 451 U.S. at 635, antitrust plaintiffs must suffer the same fate. To allow a plaintiff to recover three times his injury from one defendant, whether by way of settlement or judgment, and to retain his claim against a remaining defendant is to open the door to double recovery, which *Zenith* forbids. Policies about disgorgement notwithstanding, the statute is written in terms solely of the right of one injured in his business or property by a violation of the antitrust laws to recover for his injury, and it sets the recovery at threefold the injury he sustains, not sixfold, or ninefold, or twelvefold. 15 U.S.C. § 15.

CONCLUSION

This case presents no unusual issues. The law that governs the dispute between Sciambra and ARA does not go beyond the ordinary in antitrust analysis. The Fifth Circuit's application of it to the facts was straightforward. The district court made an obvious error when it awarded

Sciambra what it thought was necessary to compensate him for the utter destruction of a business that was not, on any reading of the record, destroyed. The Fifth Circuit's reversal and remand on damages is sound, as are its instructions to the district court to limit damages on remand to the net profits Sciambra lost during the hiatus in his operations. There are no issues in the petition of sufficient significance to suggest seriously that a writ of certiorari issue.

Respectfully submitted,

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